33456

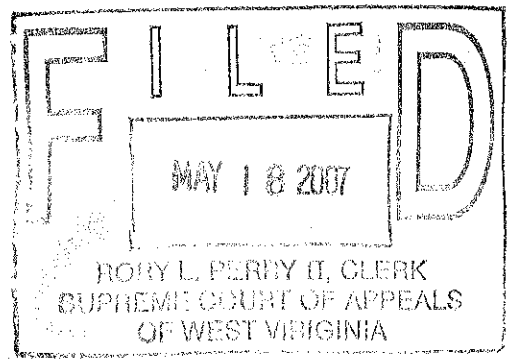
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON

FIRST CHARLES TOWN GROUP, INC., et al.,
Petitioners,

v.

THE COUNTY COMMISSION OF JEFFERSON COUNTY, a public body corporate of the State of West Virginia; and
FRANCES B. MORGAN, President;
ARCHIBALD M. S. MORGAN III, Member;
C. DALE MANUEL, Member;
JAMES T. SURKAMP, Member;
GREGORY A. CORLISS, Member; and
JENNIFER MAGHAN, Clerk, County Commission of Jefferson County,
Respondents.

IN MANDAMUS UPON ORIGINAL JURISDICTION
Case No. 071366



RESPONSE TO PETITION FOR A WRIT OF MANDAMUS

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STATEMENT OF FACTS

Jefferson County has been experiencing rapid growth in the last several years. This increase in population is a direct result of the County's location near the District of Columbia and its suburbs located in the neighboring states of Maryland and Virginia. In fact, Jefferson County shares its border with Loudon County, Virginia, the fastest growing county in the nation. Further, most residents of Jefferson County commute to the District of Columbia and its neighboring suburbs for employment. Because of this rapid growth, over the last few years, the City of Charles Town has presented several pipestem annexations to the County Commission of Jefferson County (hereinafter "the County") in an attempt to exploit the County's increasing population in the form of an increased tax base and video lottery revenue. Although the City of Charles Town receives increased revenue as a result of their annexation of county property, it never contributes to the growing demand for services created by the residential development that results from the annexation of undeveloped rural land.

The latest annexation involves territory lying approximately one-half mile beyond the Charles Town city limits. To make the property "contiguous", the City included in its request for annexation a pipestem along US Route 51 and Prospect Avenue. Each time the City has asked the county to approve an annexation, the property is usually undeveloped land that an owner plans to develop into a high density residential subdivision. Often the properties annexed are not zoned for residential growth under the County's Zoning Ordinance. In other instances the plans include other development that is also not consistent with Jefferson County zoning. Thus, owners of property located within the county seek to annex land into the City to avoid the County's zoning and planning regulations.

Once annexed, the subject land will lie within city limits, but the County will continue to provide all of the services to the property that it does currently. The County provides almost all of the services to all County residents whether those residents lie within another municipality or the unincorporated area. The County completely funds the Ambulance Authority, which provides emergency services to both the City and the County. Further, the County Communications Center dispatches all emergency response including city and county law enforcement. The County also funds the Parks and Recreation Commission, which provides and maintains the majority of the parks in the County, which are open to all Jefferson County residents. In addition, all schools in Jefferson County are provided on a county-wide basis and the City is not responsible for providing any educational facilities or busing to the students who reside within its boundaries. The police service in the proposed annexation area is currently provided by the Jefferson County Sheriff's Department.

Pipestem annexations in Jefferson County create islands of either County or municipal land. As a result of these irregular boundaries, the dispatch of emergency services, which is provided by the County for all of Jefferson County, including the City of Charles Town, becomes problematic. It is difficult for the dispatcher to determine which law enforcement agency should be dispatched to the scene of an accident or crime because the islands of land create confusion as to whether the property lies within the county or municipal boundaries. In addition, addressing becomes an issue as a result of pipestem annexations. The pipestem along the road frontage is included within the city limits when it is annexed. However, the property that lies along the pipestem remains in the County. As a result, the address, which is based upon the road frontage, indicates that the property lies within the municipal boundaries, when in fact it

lies within the County's jurisdiction. This problem also causes confusion with the dispatching of emergency services.

Additionally, in determining that the requisite petition for annexation included a majority of freeholders, the City of Charles Town considered each of the original parcels separately, assigning them separate votes, and considered the roadway as one contiguous parcel, assigning to it only a single vote (although neither the Division of Highways nor abutting or original owners were ever notified regarding the annexation). However, those portions of roadway included in the annexation consist of ***more parcels*** than the number of property owners who signed the instant petition for annexation, thereby rendering the petition for annexation a petition of ***less than a majority*** of freeholders in the annexed area. This is due to the taking of various parcels or portions of parcels by the State for placement of the respective roads. Additionally, rather than acquiring all the parcels in fee simple, the State maintains only an easement on numerous parcels, leaving fee ownership of such parcels in private hands. All of these parcels, whether owned by the State of West Virginia or private parties, are entitled to a separate vote on the annexation petition. Therefore, the petition is not signed by a majority of freeholders as the statute requires.

ARGUMENT

Standard for Writ of Mandamus

Although this Court has concurrent original jurisdiction, it has adopted a rule restricting the exercise of original jurisdiction in extraordinary writs. "By a rule adopted by the supreme court of appeals of this state, it will not take such original jurisdiction, unless special reasons appear therefore; but when such reasons are made to appear, it will, without hesitation exercise

its jurisdiction." *Syl. of* Court, *Fleming v. Commissioners, 31 W.Va. 608, 8 S.E.2d 267 (1888).* The court has opined that unless there is some good reason for not applying to the circuit court in the first instance, the appellate court will decline to exercise its jurisdiction. Further, the court has expressed its desire that whenever possible cases should first be heard in the circuit court. "Petitions in such cases should, where at all practicable be first presented to the circuit court, and when the petition is presented to this court, the reason for not presenting it to a judge of the circuit court must be set forth." *Id., at 272.*

The petitioner in this case has not presented any valid reason why the circuit court should not first hear their petition for a writ of mandamus. The petitioner first asserts that there are no issues of material fact to be adjudicated or discovered. However, with regard to the reasonableness standard articulated by this Court in *Petition of City of Beckley to Annex by Minor Boundary Adjustment, West Virginia Route 3 Right-of-Way Beginning at Present Corporate Limits, 194 W.Va. 243, 460 S.E.2d 669 (1995)*, discovery must occur to determine if the pipestem annexation sought by the city is reasonable. Currently, there has been no discovery other than the testimony heard by the County Commission when the petition for annexation was presented. Also, there is a factual dispute concerning the number of freeholders in the petition presented to the County Commission. In addition, the petitioners assert that this case will ultimately be appealed to this Court. However, if this were the standard in all of our land use cases then every land use case in Jefferson County would be heard by this Court in the first instance. In addition, the circuit which is located in the county and familiar with the land and local conditions is better situated to conduct discovery on the reasonableness factors that will be further discussed in detail. Finally, the petitioners assert that any circuit judge would likely recuse himself/herself from this case. However, our five circuit judges routinely take land use

cases, and there has never been an instance where all of the judges in the circuit have recused themselves, even in cases much more controversial than the instant case. Thus, the petitioner's assertions are not valid reasons for this court to exercise its original jurisdiction.

If the Court does exercise its original jurisdiction in this case, it is relevant to note that the petitioner has asserted that there are not issues of material fact. ***Therefore, facts contained in this response which are not denied in their petition, must be considered as true.*** The court has noted that "the petitioner in such an original proceeding must always run the risk of submitting his case where there are undetermined issues of fact raised by the pleadings, which are not met by depositions, stipulation, or other competent proof." *State ex rel Wiley v. State Road Commission, 148 W.Va. 76, 81, 133 S.E.2d 113, 116 (1963),* quoting *Board of Trustees v. City of Huntington, 142 W.Va. 217, 96 S.E.2d 225 (1957).* Further, the Court has held that "[w]hen an extraordinary proceeding instituted under the original jurisdiction of this court is submitted for final determination by the court upon petition and answer, but issues of fact are involved upon which issues of law cannot be decided without the submission of evidence or stipulation of facts or other competent proof, the denied material allegations of [the] petition are not considered as sustained, and ***undenied material allegations contained in the answer must be considered as being true.***" *Id.* at Syl. Pt. 3. Thus, if the Court exercises its original jurisdiction, all facts asserted by the County Commission must be considered as true because the Petitioner has not asserted any factual allegations in its petition and therefore has not addressed any of the factual allegations contained in the County's response, which allegations asserted by the County must be taken as valid.

County Commission's Duty is not Ministerial

The County Commission's duties with respect to a municipality's submission thereto of an annexation certificate pursuant to *W.Va. Code § 8-6-4* ("Annexation without an election") is to enter an order indicating that the municipality has made an annexation "in the manner required by law[.]" *W.Va. Code § 8-6-3*. Presumably, such a municipality has followed the requirements of law in annexing property, but when it is clear that the annexation has been carried out in a manner not permitted by West Virginia law, the County Commission cannot enter an order certifying to the contrary.

"A statute should be so read and applied ***as to make it accord with the spirit, purposes and objects of the general system of law*** of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, ***and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof***, if its terms are consistent therewith." [emphasis added] *State ex rel. Hall v. Schlaegel, 202 W.Va. 93, 97, 502 S.E.2d 190, 194 (1998)*. To contend that a municipality may carry out an annexation illegally, and then forward it to the County Commission to certify that the illegal annexation has been done legally, is a tortured reading of West Virginia's annexation laws. Such an absurd result would be far from in accord with the spirit and purposes of the subject annexation statutes. This is evidenced by the fact that the legislature included the words "in the manner required by law" in *W.Va. Code § 8-6-3* as part of what the County Commission must find in considering a municipal annexation.

These words evidence an intent on the part of the legislature that the County Commission's duty is not absolutely non-discretionary and mandatory where *W.Va. Code § 8-6-*

4(g) indicates that the County Commission "shall thereupon enter an order as described in the immediately preceding section [*§ 8-6-3*] of this article." The word "shall" ***in the absence of language in the statute showing a contrary intent on the part of the legislature***, should be afforded a mandatory connotation. *Peyton v. City Council of City of Lewisburg, 182 W.Va. 297, 301, 387 S.E.2d 532, 536 (1989).* Additionally, "in construction of legislative enactment, intention of legislature is to be determined, not from any single part, provision, section, sentence, phrase or word, but rather from general consideration of act or statute in its entirety." *McCoy v. VanKirk, 201 W.Va. 718, 500 S.E.2d 534 (1997).* The language, "in the manner required by law," in *§ 8-6-3*, along with the general purpose of the annexation law and axiomatic scheme of municipal development, presents such a contrary intent to Petitioner's allegation that the County Commission must validate even the most illegal of annexations.

Essentially, the Petitioner argues that one municipality may illegally annex any territory, even another municipality, and the County Commission must certify that it was done in the manner required by law. This application of the law would not comport with the legislature's intent and general purpose of the Code in setting out the procedure for legal annexation of territory by a municipality.

Additionally, it is well recognized that "the fundamental conception of a city or village is that it is a collective body of inhabitants, gathered together in one mass, with recognized and well-defined external boundaries which gather the persons inhabiting the area into one body, not separated by remote or disconnected areas. In its territorial extent, the idea of a city, town or village is one of unity and of continuity, not separated or segregated areas." *Potvin v. Chubbuck, 284 P.2d 414, at 416 (Idaho, 1955).* The legal and popular idea of a municipality in this country is "that of oneness, community, locality, vicinity; a collective body, not several bodies; a

collective body of inhabitants – that is, a body of people collected or gathered together in one mass, not separated into distinct masses, and having a community of interest because residents are of the same place, not different places." *56 Am.Jur.2d Municipal Corporations § 69, at 125 (1971)*. Annexation law establishes the procedure in which a municipality may grow within this well established purpose, and the County Commission's duty to certify legal annexations is simply the last step in the process, the entirety of which must comport with the purpose of municipal growth and the annexation statutes read *in para materia.*

Lack of Contiguity

Initially, *W.Va. Code § 8-6-1(a)* requires that "[u]nincoporated territory may be annexed to and become part of a municipality ***contiguous thereto*** only in accordance with the provisions of this article." No definition of "contiguous" is contained therein, nor is one contained in *W.Va. Code § 8-6-4*, the section under which the subject annexation was made. "[I]n the absence of any specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning." *Shaffer v. Fort Henry Surgical Associates, Inc., 215 W.Va. 453, 458, 599 S.E.2d 876, 881 (2004)*. The relevant definition of "contiguous" set forth by Merriam-Webster Online (www.m-w.com) is: "1. being in actual contact : touching along a boundary or point." Accordingly, any territory annexed by a municipality pursuant to *W.Va. Code § 8-6-4* should be in actual contact with or touching along a boundary or point of the municipality. This definition of "contiguous" has been applied in other jurisdictions with similar annexation statutes that do not define contiguous. See *City of Fultondale, infra.*; and *Potvin v. Chubbuck, infra.*

The territory sought to be annexed in this instance is not contiguous to the municipality. In an effort to subvert this legal requirement, the City has included a stretch of roadway in the

annexation to create an artificial contiguity by creating a link between the municipal border and the territory sought to be annexed. Caselaw dealing with annexations in West Virginia is sparse and no on-point authority exists in West Virginia. However, this type of "pipestem," "strip," or "corridor" annexation as it relates to the issue of contiguity has been addressed by a number of other jurisdictions.

In *City of Fultondale, et al., v. City of Birmingham, et al., 507 So.2d 489 (Alabama., 1987)*, the court examined nearly identical fact patterns whereby two municipalities included one or more roadways in their respective annexations in order to create contiguity. Of important note is that the court indicated that Alabama's annexation statutes do not specifically define "contiguous," but that there is a requirement that territory to be annexed be contiguous to the boundary of the city at some point. *Id., at 490*. In applying a contiguity requirement very similar to the one in West Virginia, the court overruled prior caselaw, and ultimately held that "the use of public road rights-of-way to create contiguity is unreasonable and invalid as a matter of law." *Id., at 491*. They recognized that the public road rights-of-way "were used merely to create contiguity and, in effect, to avoid the requirement of a touching at some point. We do not believe the legislature intended to allow annexation in this manner." *Id., at 491*. The court in Fultondale, supra, also recognized that most courts that have addressed the issue of "corridor" or "strip" annexation have disfavored it. *Id., at 490*.

Similarly, in *Potvin v. Chubbuck, 284 P.2d 414, at 418 (Idaho, 1955)* observed that the only apparent purpose of including a strip of public highway in an annexation was to provide a connecting link with the land actually sought to be annexed and that for all practical purposes it would divide the village from the proposed territory and thus the essentials of contiguity were lacking. Again, the word "contiguous" was undefined in the relevant annexation statute,

whereby the court indicated that it should be construed to have a meaning in its primary and obvious sense, and the territory to be annexed must be adjoining, contiguous, conterminous or abutting. See *Id., at 416.*

A majority of other jurisdictions have also held that the inclusion of roadways in an annexation to create a link between the municipality and the territory sought to be annexed does not satisfy the contiguity requirement and contravenes the purpose and intent behind annexation law. See *In re City of Springfield, 228 N.E.2d 755 (Ill.App. 1967)* (holding that inclusion of a 40-foot strip of road, 2,640 feet long, in an annexation was insufficient to create required contiguity with territory sought to be annexed.); *People ex rel. Cherry Valley Fire Protection Dist. v. City of Rockford, 258 N.E.2d 577 (Ill.App. 1970)* (reiterating that roadway annexations have been repeatedly held invalid as "corridor" or "strip" annexations that fail to meet the tests of contiguity as intended by the legislature, and that contiguity means an actual touching in a reasonable physical sense.); and *Ridings v. City of Owensboro, 383 S.W.2d 510 (Ky., 1964)* (holding that the annexation of two highways for sole purpose of providing contiguity for three annexed tracts of land was a mere subterfuge which could not supply necessary contiguity for the three tracts to which they led.).

Surely, the legislature never intended that a municipality may annex non-contiguous territory many miles away from it simply by including a maze of winding roads and streets which ultimately connect the territory to the municipal boundary. This subversion of the contiguity requirement would invite abuse and lead to absurd results whereby a municipality may consist of a spider-web array of territories spread out all over the county, connected to the municipality by a web of roads and streets. And to say that a County Commission *must*

ministerially certify that such annexations are done "in the manner required by law" is disingenuous, and again not the intent of the legislature.

Failure to Properly Consider Roadway Parcels

W.Va. Code § 8-6-4 provides, in part:

> "(a) The governing body of a municipality may, by ordinance, provide for the annexation of additional territory without ordering a vote on the question if: (1) A majority of the qualified voters of the additional territory file with the governing body a petition to be annexed; and (2) a majority of all freeholders of the additional territory, whether they reside or have a place of business therein or not, file with the governing body a petition to be annexed.
> ...
> (e) ***It shall be the responsibility of the governing body to enumerate and verify the total number of eligible petitioners, in each category, from the additional territory.*** In determining the total number of eligible petitioners, in each category, a freeholder or any other entity that is a freeholder shall be limited to one signature on a petition as provided in this section. ***There shall be allowed only one signature on a petition per parcel of property*** and any freehold interest that is held by more than one individual or entity shall be allowed to sign a petition only upon the approval by the majority of the individuals or entities that have an interest in the parcel of property." [emphasis added]

In the instant case, the municipality was entirely delinquent in its duty to enumerate and verify the total number of eligible petitioners, specifically freeholders, and ultimately presented a deficient annexation to the County Commission for certification which was void. This is due to the municipality's failure to account for various parcels included in the annexed roadways, comprising nearly a mile, which affects the analysis of eligible petitioners. Accordingly, the annexation presented to the County Commission was void and the Commission had no duty to certify that the annexation was done "in the manner required by law." *W.Va. Code § 8-6-3.*

To reach the territory sought to be annexed, the municipality has included in the annexation a stretch of road and road rights-of-way of two separate roads. However, prior to construction of the road, the Division of Highways acquired numerous parcels from various

property owners which pieced together to form the area where the roadway was placed. Each of these parcels is distinct, allotting one vote per parcel, either to the private landowner or to the Division of Highways, which votes were never examined or accounted for by the municipality, as was its duty to do so. Taking into account these numerous, distinct parcels, the original petition for annexation does not represent a majority of freeholders as required for annexation under *W.Va. Code § 8-6-4*.

"Freeholder" means "any person…owning a freehold interest in real property." *W.Va. Code § 8-1-2(b)(14)*. Additionally, "person" is defined as "any individual, firm, partnership, corporation, company, association, joint-stock association, or any other entity or organization of whatever character or description." *W.Va. Code § 8-1-2(b)(18)*. Accordingly, the Division of Highways, having a freehold interest in the numerous parcels making up the roadway, is entitled to one vote per parcel. Since this number of votes equals or exceeds those set forth in the petition for annexation, a majority of freeholder votes is lacking in this instance.

Further, the roadway may not be counted as a single parcel. The parcels acquired by the Division of Highways retain their historical identity as separate parcels, as is clear by the public policy set forth in *W.Va. Code § 17-2A-19(c)(3)(A)*, which states:

> "With respect to real property acquired subsequent to the year one thousand nine hundred seventy-three for use as a highway through voluntary real estate acquisition or exercise of the right of eminent domain, which real estate the commissioner has determined should be sold as not necessary for highway purposes, ***the commissioner shall give preferential treatment to an abutting landowner*** if it appears that:
>
> (i) ***A principal abutting landowner is an individual from whom the real estate was acquired*** or his or her surviving spouse or descendant. In order to qualify for preferential treatment, the surviving spouse or descendant need not be a beneficiary of the individual. The terms used in this subdivision are as defined in section one [§ 42-1-1], article one, chapter forty-two of this code; and
>
> (ii) The primary use of the abutting property has not substantially changed since the time of the acquisition." [emphasis added]

Were the distinction between the parcels used in forming the roadway to be dissolved, thereby creating one continuous parcel comprising the roadway, the right of first refusal set forth in *§ 17-2A-19(c)(3)(A)* would be meaningless. In order for this right of first refusal to operate, the parcels must, and are intended by statute to, retain their historical distinction. Accord *McCoy v. VanKirk, 201 W.Va. 718, 500 S.E.2d 534 (1997)* (under statute that allows Commissioner of Division of Highways to dispose of certain unneeded highways real estate, Commissioner was required to offer abutting landowner right of first refusal to purchase highways property at fair market value.); and *Mills v. VanKirk, 192 W.Va. 695, 453 S.E.2d 678 (1994)* (abutting property owners must receive preferential treatment in sale of turnpike and railway property which is deemed by commissioner of highways not to be necessary or desirable for state road purposes).

Additionally, many of the deeds recorded by the Division of Highways concerning the various parcels indicate that the Division of Highways has acquired merely an easement on the property going down to a total depth of only 400 feet. These easements do not strip the property owners of their rights *in toto* to the property, again retaining the parcels' historical identities and requiring that each must be counted separately in an annexation proceeding. Ownership of each distinct parcel remains with the private landowner and no dissolution of boundary lines separating such parcels occurs.

It has been ruled that where any portion of a legally distinct tract or lot is proposed to be annexed, any adult freeholder residing on such tract or lot is entitled to sign an annexation petition and must be counted in determining the required majority. See *Smith v. Shelley, 10 Ohio.App.2d 70, 73, 226 N.E.2d 767, 769 (1967)*. Where an easement has been acquired by the Division of Highways, but the ownership remains in private hands, such private owner is a freeholder with a valid vote. Where the Division of Highways obtains a parcel in fee simple, the

parcel retains is historical identity and the Division of Highways is the voting freeholder for that parcel.

Additionally, in *State ex rel. Butler Twp. Board of Trustees v. Montgomery County Board of County Commissioners, 112 Ohio St.3d 262, 858 N.E.2d 1193 (2006)*, landholders who owned in fee simple the property underlying a roadway were multiple "owners" for purposes of an annexation statute and thus had to be included in determining the number of owners needed to sign a municipality's petition to annex the roadway; not counting them as owners would have deprived them of one of the property rights that they would normally have. With regard to a state-owned roadway, the court in *State ex rel. Butler Twp. Board of Trustees, supra, at 271, 1201, Footnote 9*, stated:

> "[W]hen an annexation sought by private property owners includes a roadway owned in fee simple by the state or another political subdivision, the state or political subdivision is not counted as an "owner" under R.C.709.02(E) for purposes of signing the annexation petition unless the state or political subdivision chooses to sign the petition. In a situation in which the state or political subdivision fully owns the roadway but does not sign the petition, roadway property annexed into a municipality would have no "owner" under the definition of R.C. 709.02(E)."

However, it is significant that the West Virginia statute on the subject, *§ 8-6-4*, does ***not*** similarly restrict the ability of the State to be treated as an "owner" for the purposes of an annexation proceeding when the State owns the fee in a highway which is part of the area being annexed. In fact, the definition of "freeholder" in *W.Va. Code § 8-1-2(b)(14)* ***specifically includes*** such an entity. In any event, the municipality, in completely ignoring the parcels and/or easements comprising the roadway, never notified or inquired of the State or relevant private landowners such that they might exercise their right to vote on the petition for annexation.

It is a well-settled rule that an abutting landowner has two distinct kinds of rights in a road or highway: a public right in common with all other citizens and certain private rights that

arise from ownership of property adjacent to the highway and that are not common to the public generally, regardless of whether the fee of the road lies with him. See *Wright v. City of Monticello, 345 Ark. 420, 429, 47 S.W.3d 851, 857 (2001)*. The court indicated that "[t]he owner of property abutting upon a street or highway has an easement in such street or highway for the purpose of ingress and egress which attaches to his property and in which he has a right of property as fully as in the lot itself." *Id., at 426, 855.*

Based upon the foregoing, it is evident that the separate status of each parcel is not dissolved for all time and all purposes when a highway is created, whether the State acquires either fee ownership or merely an easement interest. It follows logically that while the highway is in existence, and not merely before and after it is a highway, the individual parcels retain their respective historical identities and give rise to separate freeholder voting interests in an annexation proceeding. Additionally, there is no allowance in *W.Va. Code § 8-6-1, et seq.*, for treating such parcels as one; the requirement in *§ 8-6-4* is that there shall be allowed one signature on a petition ***per parcel of property.***

The municipality was severely remiss in its duty to examine and account for these numerous freehold votes, presenting a void annexation ordinance to the County for certification.

The Annexation Fails the Reasonableness Standard

In West Virginia, a reasonableness standard is applied to an inquiry into the validity of an annexation. The Court articulated this standard in *Petition of City of Beckley to Annex by Minor Boundary Adjustment, West Virginia Route 3 Right-of-Way Beginning at Present Corporate Limits, 194 W.Va. 243, 460 S.E.2d 669 (1995).* "Moreover, when we deal as here, with an annexation by way of minor boundary adjustment the process itself carries

sufficient built in protection to avoid any truly outrageous geographical result. As we have previously discussed, *W.Va. Code 8-6-5* requires the municipality to propose the annexation. Common sense would dictate that the municipality would not undertake a burdensome obligation to supply services to the annexed area by extending them at great length along a narrow strip of land. Thus, there is an element of reasonableness that will control the city's decision to annex." *Id. at 430.* When the court adopted this standard it granted county commission discretion in reviewing annexation proposals with regard to minor boundary adjustments. "In general, a county commission enjoys broad discretion in exercising its legislative powers in determining the geographic extent of a minor boundary adjustment sought by a municipality under *W.Va. Code 8-6-5*, so long as portion the area to be annexed is contiguous to the municipality." *Id. at Syl. Pt. 6.* Therefore, the Court has recognized that the County Commission possesses some discretion with regard to annexation requests.

West Virginia has adopted a reasonableness standard in which the city's decision to annex is given the presumption of reasonableness if the city will be supplying services to the area. Thus, the presumption carries with it the presumption that the city will provide services to the annexed area. If the city is not supplying services to the area, then the decision will never burden the city and the presumption is defeated. In such an instance the reasonableness of the annexation must be examined when the County, not the city, will endure the burden of supplying and financing the services to the annexed area. Similarly, the state of Missouri affords the city the same presumption of reasonableness as West Virginia, but still permits an examination of the reasonableness of the city's decision to annex. "Under Missouri law, in any annexation where the prescriptions of statutes have been followed, the action of the city will be presumed to have had a reasonable basis. But a right to test legally whether the city's action has in fact had a

reasonable basis is recognized. . ." *City of Sugar Creek v. Standard Oil Co., 163 F.2d 320, 322 (1947).* In Jefferson County, the majority of the services are provided countywide and paid for out of the County budget. Accordingly, the city does not enjoy the presumption of reasonableness and the city's request must be examined to determine if it is reasonable.

Although West Virginia has not elaborated on what is meant by reasonable, other states that employ the same standard have developed factors to determine whether an annexation is reasonable. The neighboring state of Virginia has articulated factors to be considered to determine whether an annexation is reasonable.

> "In determining whether annexation is necessary and expedient for a city or town, factor to be considered are its size, crowded condition, its past growth, its need in the reasonably near future for development and expansion, the health of the community, whether the terms proposed are reasonable, fair and just, and whether provision will be made for future management., the result of the development promised by the combination of the resources of two urban communities under a single political unit in light of the best interests of the State, town, or city, the county, and the territory proposed to be annexed, community of interest, if any between the town, or city and the area proposed to be annexed, and financial ability of the town or city to provide for development after annexation."
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> *City of Roanoke v. County of Roanoke, 204 Va. 157, 162, 129 S.E.2d 711, 714 (1963).*

In Mississippi, the court has also developed a similar list of factors to be considered when reviewing an annexation. The court indicated that the following factors should be considered:

> "(1) the municipality's need for expansion, (2) whether the area sought to be annexed is reasonably within a path of growth of the city, (3) the potential health hazards from sewage and waste disposal in the annexed areas, (4) the municipality's financial ability to make the improvements and furnish municipal services promised, (5) the need for zoning and overall planning in the area, (6) the need for municipal services in the area sought to be annexed, (7) whether there are natural barriers between the city and the proposed annexation area, (8) the past performance and time element involved in the city's provision of services to its present residents, (9) the impact (economic or otherwise)of the annexation upon those who live in or

> own property in the area for the proposed annexation, (10) the impact of the annexation upon the voting strength of protected minority groups, (11) whether the property owners and other inhabitants of the areas sought to be annexed have in the past and in the foreseeable future unless annexed, will because of their reasonable proximity to the corporate limits of the municipality, enjoy the (economic and social) benefits of proximity to the municipality without paying their fare share of taxes . . ."
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> *In re Extension of Boundaries of City of Hattiesburg v. City of Hattiesburg, 840 So.2d 69, 82-83 (Miss. 2003).*

If these factors are examined in relation to Jefferson County, they reveal that the annexation of Windmill Crossing is unreasonable. As more fully discussed below, the municipality does not have a need to expand any more than the entirety of Jefferson County is expanding. This territory is not located within Charles Town's path of growth. It lies outside of the city limits and is only contiguous to Charles Town by using a two-road pipestem that stretches along U.S. Route 51 and Prospect Avenue. Further, the proposed area is already governed by the County's land use ordinances and is not in need of zoning or overall planning. In addition, the city will not provide the majority of services to the annexed area. Instead, the County funds fire and EMS services, parks and recreation, the ambulance authority, and the communications which is responsible for administering the 911 system and addressing. In addition, the cities do not fund schools which are also provided for on a county wide basis. The only service that Charles Town will provide to the annexed area is police protection. However, the area is already serviced by police provided by the Jefferson County Sheriff's Department and thus, the annexed area is not in need of any municipal services. Finally, the residents of the annexed area do not benefit socially or economically because of their proximity of the municipality without paying their share of taxes. Rather, most residents of the county who commute either to Maryland, Virginia, or the District of Columbia, derive economic benefit from those areas and much of the growth in Jefferson County is a result of the economic growth in those surrounding areas. Therefore, it is

clear that the municipality cannot provide better services than the county, nor are those in the annexed area deriving benefits from the municipality to the city's detriment. Rather, the reverse is true. Charles Town continues to annex areas and permit landowners to develop land at a density higher than that permitted under County zoning. Because most services are provided by the county, the city can do this without any concern for the city's finances. Accordingly, most annexations benefit the city who receives a wider tax base and more video lottery money as its population expands, while the county is left to pay for the additional services necessary to serve the city's growing population.

As several courts have indicated, the purpose of annexation is also an important criterion to be considered when determining whether a city's attempt to annex is reasonable. Annexation is usually utilized to extend the city's boundaries to areas where there has been substantial growth and the city is in the better position than the county to provide services to those areas.

> "Generally annexations are brought about by the growth of cities from within, caused by the expanding of the industrial development through the enlargement of manufacturing plants located within their borders or the bringing in of new enterprises. In such cases the population at times becomes overcrowded and people move beyond the corporate limits to live. These citizens moving from the city to the suburbs continues to work in the city, looking to the city for their livelihood. They shop there, seek amusement there, enter into the city's social life, and receive the benefits of city dwellers without paying for the privilege. In such cases there is a definite community of interest between the people of the city and the suburb which is an outgrowth of the city."
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> *City of Falls Church v. Board of Supervisors of Fairfax County, et al., 193 Va. 112,118, 68 S.E.2d 96, 100 (1951).*

In these cases, if the city can meet the requirements of the annexation statute, then annexation will be ordered. In *City of Sugar Creek, supra, at 325,* the Court found that the annexation was not reasonable citing the fact that the residential developments included in the proposed annexation in no way owed their growth or value to Sugar Creek and that they were without

dependence on the city for furnishing the necessary infrastructure or emergency services. In that case, the territory sought to be annexed by the city included 200 family homes. The Court noted that none of the developments were a product of an incident to Sugar Creek's existence but the majority of the population increase was the product of overflow from nearby urban areas of Kansas City. *Id. at 322*

Similarly, the court in *City of Falls Church, supra,* examined the growth of the proposed area to determine if the annexations were reasonable. In that case, Falls Church sought to annex territory located under the jurisdiction of Fairfax county, alleging that it needed the area because most of the available land had been developed and that its future growth would be impeded unless it was permitted to take more territory through annexation. After discussing the purpose of annexation the Court determined that annexation of the unincorporated area was not necessary, citing that the growth of the city was not due to anything that occurred within the city's own borders. "In the instant case it is not unfair to state that the City of Falls Church owes its increase in population to nothing that has happened within its borders. The growth of both areas [the county and the city] is traceable directly to the location of the Federal Government in the District of Columbia. The whole area including the City of Falls Church is a satellite of the city of Washington." *City of Falls Church v. Board of Supervisors of Fairfax County, et al., 193 Va. 112,118, 68 S.E.2d 96, 100 (1951)* The situation of Fairfax County and the City of Falls Church mirrors that of Jefferson County and the City of Charles Town. The entire area of Jefferson County, including Charles Town, owes its growth to the urban areas in Maryland and Virginia that surround the county. Most of the County's workforce commutes to Maryland, Virginia, or the District of Columbia for employment. Thus, like the City of Falls Church, the

community of interest between the area to be annexed and Charles Town is not present here and therefore cannot be considered reasonable in light of the purpose of annexation.

As previously discussed, several jurisdictions have placed considerable weight on the provision of emergency services and include it as a factor to be considered when determining whether an annexation is reasonable. In many cases when city plans to provide a potential annexed territory with services that are already provided by the county, the courts have held that those annexations are unreasonable. In a Missouri case, the court there concluded that "the needs of the county as whole must be considered in an annexation decision." Further the Court noted that the area was self-sufficient, having better services than the city could have supplied. There was also evidence that the area was an integral part of the county's overall plan of regional development. *City of Des Pres v. Stapleton, 524 S.W.2d 203, 209 (1975) quoting City of Olivette v. Graeler, 369 S.W.2d 85 (Mo. 1963).* In Ohio, the Court, in *In re: Petition for Annexation of 131.983 acres, 1995 WL 418694 (Ohio App. 2 Dist.)*, found the annexation unreasonable in light of the fact that the city wishing to annex would utilize currently available fire and emergency services because the City had no independent fire or emergency medical services. Further the Court noted that there was no evidence that indicated that the city's police force was in any way superior to that currently provided by the county. These situations are all analogous to the case at hand in which the County provides emergency services, and Charles Town currently does not provide nor fund any fire or EMS services within its city limits and the annexed area will continue to receive emergency services which are funded and provided by the county.

In addition, the Ohio Court, in finding a proposed annexation unreasonable, noted that the possibility of dispatching the city's police and the Randolph Township fire department to the

area annexed by the City of Union presented routing difficulties for Miami County Communications Center and that neither the county's 911 system was designed to accommodate such a division of services. Similarly, the County Commission heard testimony from its Director of Communications, Jeff Polzynski, that the County's 911 dispatching system, which services all of Jefferson County, including the municipalities, also has difficulty dispatching fire and police service in the case of shoestring annexations. Mr. Polzynski stated that although the road has been annexed by the city, the properties along that road remain within the County and when police must be dispatched, the center cannot determine which police force to dispatch to the scene because the road indicates the property lies within the municipality but the property is actually within the jurisdiction of the Jefferson County Sheriff's Department. In addition, pipestem annexations create "islands" of county property in which the Sheriff has jurisdiction. However, because the island is surrounded by the municipality, often a police force without jurisdiction is dispatched because the property appears to lie within the municipality.

It is clear, after an examination of all those factors that must be considered when determining if an annexation is reasonable, that the subject pipestem annexation request is unreasonable. Charles Town will not provide any services to the area that County does not already provide. In addition, the County will be burdened to provide the services it already provides to the area without any additional assistance from the City, which will increase its tax base and video lottery revenue. Further, the purpose of annexation is not being served by the subject annexation request and the area to be annexed is not a natural extension of the city limits. Therefore, the city's request to concerning the instant annexation does not meet the reasonableness test.

W.Va. Code § 8-6-4 is Unconstitutional

W.Va. Code § 8-6-4 is unconstitutional because it interferes with the police powers granted to the County Commission in the West Virginia Constitution without providing the County Commission a means to control annexations to ensure they are consistent with the County's Comprehensive Plan and other land use ordinances. "The county commission. . .shall also under such regulations as may be prescribed by law, have superintendence and administration of the internal police and fiscal affairs of their counties. . ." *W.Va. Const. Art. IX § 11.* Zoning and Planning is an exercise of the County Commission's police power. "A zoning ordinance, as an exercise of the broad police power of the local governing body, is rebuttably presumed valid." *Par Mar v. City of Parkersburg, 183 W.Va 706, 709; 398 S.E.2d 532, 535 (1990).* "Under a valid statutory delegation to it of the police power of the State, a municipality may enact a zoning ordinance which restricts the use of property in designated districts within the municipality if the restrictions imposed in the ordinance are not arbitrary or unreasonable and bear a substantial relation to the health, safety, morals, or the general welfare of the municipality." *Syllabus Point 7, Carter v. Bluefield, 132 W.Va. 881, 54 S.E. 2d 747 (1949).* Jefferson County enacted a Zoning Ordinance in 1988 and is currently in the process of updating that ordinance to bring it into compliance with the new planning and zoning statutes codified in *W.Va. Code 8A-1-1, et seq.* To assist it with these amendments, the county has entered a $170,000.00 contract with a consultant.

The county's zoning ordinance is based upon a comprehensive plan, which guides the county's plans for current and future growth. "The general purpose of a comprehensive plan is to guide a governing body to accomplish a coordinated and compatible development of land and improvements within the territorial jurisdiction, in accordance with present and future need and

resources." *W.Va. Code 8A-3-1(a)*. The West Virginia Code further provides that a comprehensive plan should "[c]oordinate all governing bodies, units of government and other planning commissions to ensure that all comprehensive plans and future development are compatible." *W.Va. Code 8A-3-1(3)*. Further the comprehensive plan must include plans and goals to provide for the "proposed distribution, location and suitable uses of land," to "ensure public safety," to set programs to promote a "sense of community," and identify areas where incentives may be used to encourage development. *W.Va. Code 8A-3-4*. Each time a municipality annexes a piece of the county's unincorporated territory, the County's ability to effectively plan and zone, pursuant to the comprehensive plan, is impaired. The county's comprehensive plan is based upon those territories that lie within its jurisdiction at the time it is written. However, the county cannot effectively anticipate which areas of the county any municipality will annex and thereby the county's plans for future growth and the orderly development of the county are interrupted, invalidating the Comprehensive Plan. Therefore, the County is forced to update its comprehensive plan more than the every ten years suggested in the statute.

In addition, when a municipality annexes land, thereby superimposing its own land use on that area, it affects the county's zoning. When a municipality annexes and allows a landowner to develop land in a manner that is inconsistent with the remaining unincorporated territory that surrounds that annexed area, the county's zoning restrictions become unreasonable and arbitrary. The county can no longer justify a zoning restriction when other uses have been permitted in the zone as a result of annexation. "In a challenge to the validity of a zoning ordinance as applied to the property in question, the relevant factors include the following: (1) existing uses and zoning of the nearby property. . ." *Par Mar v. City of Parkersburg, 183 W.Va.*

706, 710, 398 S.E.2d 532, 536 (1990). Thus, when the city allows a use on an "island" of annexed property that is not permitted under the county's zoning, the zoning of the entire surrounding area that still remains within the county's jurisdiction becomes invalid and the county is forced to rezone the area based upon the municipalities actions. In addition, the West Virginia Code provides for rezoning of a property when the character of an area has changed. Owners of real property may petition the county commission to amend the zoning of an area. Before the amending the ordinance to change the zoning, the county commission must find that the amendment is consistent with the comprehensive plan. However, if the amendment is inconsistent, "the governing body. . .must find that there have been major changes of an economic, physical or social nature within the area involved which were not anticipated when the comprehensive plan was adopted and those changes have substantially altered the basic characteristics of the area." *W. Va. Code 8A-7-9(c)*. Annexation of an area that is developed consistent with a municipality's rather than the county's zoning, is such a change that can alter the characteristics of the area. In such a case, the law mandates that the county change a zoning classification of its territory that surrounds an annexed parcel in order to ensure that the zoning ordinance is reasonable. In this manner, the municipality's annexation controls the county's zoning and again the county is forced to update its zoning to keep pace with unrestrained annexations. Further, the County's money is wasted on a consultant to update the Zoning Ordinance if the County must change it every time the County's geographical boundaries change in an unanticipated manner due to annexations by municipalities.

The West Virginia Code also provides other land use controls to assist the county in controlling growth and preserving precious farmland. *W.Va. Code § 7-1-3mm* provides for the implementation of transferable development rights (TDRs), whereby those landowners in the

rural zone may transfer their development rights to another area of the county. One zone is designated as a sending area while another is designated as a receiving area. In this manner, farmers may profit from their development rights in order to sustain agricultural activities on their property, while preserving the rural zone and agriculture in the county. However, the County Commission has had difficulty implementing a TDR program because of the unpredictable nature of annexation. The city, through pipestem annexations, can annex virtually any unincorporated territory, and it is impossible to predict which areas the city may wish to annex next. A county map outlining the municipal boundaries demonstrates how unpredictable municipal annexation can be. Because of the inability to foresee which areas may come under the city's jurisdiction, the county cannot designate any area a receiving zone without the apprehension that the receiving zone may no longer be available to the county because it has been absorbed through annexation. Thus, the county's TDR program has more sending area than it does receiving and it becomes impossible to administer the program as more and more open space available for receiving is incorporated into the city. This interference with TDRs is another infringement upon the county's police powers.

Other courts have recognized that a landowner may not utilize annexation to avoid the land use restrictions of an area. In *City of Sugar Creek, supra*, the court noted that annexation ordinarily should not be made of lands "(1) which are used only for purposes of agriculture or horticulture and are valuable on account of such use, or (2) which are vacant and do not derive special value from the adaptability of urban uses." *163 F.2d at 323*. Traditionally, in Jefferson County, if land is used for agriculture, it is designated as a rural zone and high density development is not permitted without a conditional use permit. However, in order to avoid this

designation, landowners will annex into the city in order to develop the land at a much higher density than would be permitted under the county zoning.

In *Board of Trustees, Village of Spring Valley v. Town of Ramapo, 264 A.D.2d 519, 694 N.Y.S.2d 712 (2d Dep't 1999),* a village sought approval of its proposed annexation of a 12 acre portion of an 18 acre island of town territory which was entirely surrounded by village territory. The court ruled that annexation was not in the overall public interest where, among other things, it would have allowed the village to avoid the town's zoning designation of the island for detached and semi-detached residences. The court also noted that "[a]nnexation may not be used as a means by which the owner of land in one municipality may escape the effect of that municipality's local legislation by having the land transferred to an adjoined municipality." *In the Matter of Board of Trustees, Village of Spring Valley v. Town of Ramapo et al., 264 A.D.2d 519, 520, 694 N.Y.S.2d 712 (1999).* Similarly, annexations are routinely used by landowners to avoid either Jefferson County's zoning or land use processes. Accordingly, annexation is injurious to the county and the public interest, because one of its effects is to frustrate the County's zoning ordinance, comprehensive plan, and the orderly development of the County.

Annexations interfere with county's ability to effectively exercise its police powers in the form of land use controls such as zoning and planning. In order to stay abreast of annexations and their effect on the County's Comprehensive Plan, Zoning and Planning Ordinances, the county would have to review its ordinances at a minimum of every year because city annexation controls the manner in which the County's territory will develop. As a result, the County must base its land use controls not on its own regulations or plans for future development contained in the Comprehensive Plan but upon the city's restrictions and land use controls. As such, the

annexation statute interferes with the valid exercise of the County's police power and is accordingly unconstitutional.

CONCLUSION

The subject annexation was performed in contravention of the West Virginia Code, specifically in light of the legislative intent of the County Commission's certification thereof, the general purpose of annexations, and the scheme of municipal structure and expansion. The City of Charles Town was delinquent in its duty to annex contiguous territory as the territory sought to be annexed is not adjacent to the municipality. Further, the City failed to verify the correct number of parcels, failing entirely to account for the numerous parcels comprising the roadway which must each be accorded a separate vote, which in this case defeats the majority alleged in the petition for annexation. Additionally, the subject annexation fails the reasonableness standard which applies to annexations in the State of West Virginia.

Finally, the relevant statute is unconstitutional as it permits a municipality to seriously infringe upon the County's constitutional police powers regarding zoning.

Accordingly, the Respondents respectfully request that the instant Petition for Writ of Mandamus be denied.

Respectfully Submitted:

THE COUNTY COMMISSION OF JEFFERSON COUNTY, *et al.*, Respondents,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON

FIRST CHARLES TOWN GROUP, INC.,
et al.,
Petitioners,

v.

THE COUNTY COMMISSION OF
JEFFERSON COUNTY, et al.,

IN MANDAMUS UPON
ORIGINAL JURISDICTION
Case No. 071366

CERTIFICATE OF SERVICE

I do hereby certify that I have, on this 17 day of May, 2007, served the foregoing Response to Petition for Writ of Mandamus upon all counsel listed below by depositing a true and exact copy thereof in the United States mail, postage prepaid.

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